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No. 04-81

IN THE
Supreme Court of the United States

BASF CORPORATION,
Petitioner,
v.
RONALD PETERSON, ET AL.,
Respondents.

On Petition For A Writ of Certiorari To The Supreme Court of Minnesota

MOTION OF CROPLIFE AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF IN SUPPORT OF PETITIONER

Of Counsel:
DOUGLAS T. NELSON
SEEMA MAHINI
CROPLIFE AMERICA
1156 15th Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 296-1585

LAWRENCE S. EBNER
Counsel of Record
MCKENNA LONG & ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Attorneys for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Sup. Ct. R. 37.2(b), CropLife America hereby moves for leave to file the accompanying *amicus curiae* brief in support of the petition for a writ of certiorari. Although counsel for petitioner BASF Corporation has consented to the filing of the brief, respondents' counsel has withheld consent.

CropLife America is a national, not-for-profit trade association which promotes the environmentally sound use of crop protection products (including various types of herbicides, insecticides, fungicides, and other pesticides) for the economical production of safe, high quality, and abundant food, fiber, and other crops. Established in 1933, CropLife America (formerly known as the American Crop Protection Association and, before that, the National Agricultural Chemicals Association) represents the developers, manufacturers, formulators, and distributors of plant science solutions for agricultural pest management in the United States. The association's members produce, sell, and distribute virtually all of the agricultural pesticides and biotechnology products used by American farmers.

CropLife America frequently participates as *amicus curiae* in cases, like this one, which raise important issues arising under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136-136y (2000). FIFRA, the comprehensive federal pesticide regulatory statute, is administered by the United States Environmental Protection Agency ("EPA"). The association's members (which include BASF) have a particular interest in ensuring that courts, when confronted with state law liability claims that directly or indirectly attack a pesticide's EPA-regulated product labeling, properly apply FIFRA's preemption provision, § 136v(b), which expressly prohibits the states

from imposing their own additional or different requirements for pesticide labeling. Because this case raises a significant FIFRA preemption question that potentially affects many of the association's members, CropLife America filed *amicus curiae* briefs in the Minnesota state supreme court and state court of appeals proceedings below. During the past fifteen years, CropLife America has filed *amicus curiae* briefs in other key appeals involving the preemptive scope of FIFRA, including before this Court in *American Cyanamid Co. v. Geye,* 79 S.W.3d 21 (Tex. 2002), *cert. denied*, 123 S.Ct. 2637 (2003), and *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991).

This case raises additional issues relating to subjects in which CropLife America has a substantial interest. More specifically, the association and its members have a vital interest in promoting the safe and effective use of pesticides, and in discouraging their misuse, such as when a FIFRA-registered product is applied to crops that are not included on its EPA-approved labeling. Further, as responsible product stewards, the association's members have an abiding interest in adequately testing their pesticide products before making them available for use by farmers on particular types of crops.

CropLife America wishes to share with the Court its perspective on why the far-reaching issues raised by this appeal warrant review. Accordingly, the association's

motion for leave to file the accompanying *amicus curiae* brief should be granted.

Respectfully submitted,

Of Counsel:
DOUGLAS T. NELSON
SEEMA MAHINI
CropLife America
1156 15th Street, NW
Washington, DC 2000
(202) 296-1585

LAWRENCE S. EBNER
Counsel of Record
McKenna Long &
Aldridge LLP
1900 K Street, NW
Washington, DC 20006
(202) 496-7500

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BRIEF OF CROPLIFE AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

SUMMARY OF ARGUMENT

The Court should grant the petition because unless the decision below is reversed, it will have nationwide reverberations that destabilize the underpinnings of the federal/state pesticide regulatory scheme, stifle innovative activity within the pesticide industry, and impair American farmers' already precarious ability to produce a broad variety of food crops in a cost-effective manner. There are at least five reasons why the lower court's opinion is a destructive precedent which warrants this Court's review:

First, the opinion below allows individual state court juries to usurp EPA's exclusive authority under FIFRA to establish requirements for the content and format of a pesticide product's nationally uniform labeling, including with regard to listing the agricultural crops on which a product may be lawfully (and safely) applied. *Second*, the opinion below transforms a voluntarily obtained FIFRA registration into both an unqualified license and a state law duty to sell a product throughout the United States for all of

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[1] Pursuant to Sup. Ct. R. 37.6, CropLife America states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

its federally registered uses; the opinion thereby not only encroaches upon business prerogatives, but also each state's authority to restrict, based on agricultural, environmental and other factors within its own borders, the sale and use of FIFRA-registered pesticides, such as by determining on which crops within the state a product can be safely used. *Third*, the opinion below undermines FIFRA's crucial prohibition against using a pesticide in a manner inconsistent with its EPA-approved labeling, such as by applying a product to crops that are not included on its labeling. *Fourth*, the opinion below discourages adequate pre-market testing of pesticide products to ensure that they are safe and effective for use on particular types of crops. *Fifth*, the opinion below eliminates pesticide manufacturers' already tenuous economic incentives for developing and marketing products that are suitable for use on low-acreage "minor" crops such as fruits and vegetables, which have high economic value to farmers and nutritional benefits for consumers.

If the opinion below is allowed to stand, these and other pernicious consequences will emanate from the lower court's failure to apply the well established principle that FIFRA preempts any type of state law claim, no matter how denominated, that has the effect of challenging a pesticide product's EPA-approved labeling.

ARGUMENT

CropLife America and its members view the Minnesota Supreme Court's decision in this nationwide class action as a serious threat to the structure and operation of the federal/state pesticide regulatory scheme. That court's opinion upholds a jury verdict which requires an R&D-oriented pesticide manufacturer to pay tens of millions of dollars under a state consumer fraud statute on the theory that it engaged in an "unconscionable commercial practice" by distributing a FIFRA-registered product with EPA-

authorized and approved "subset" labeling, and by advocating against unlawful, potentially hazardous, off-label use of pesticides. If left undisturbed, this decision will continue to engender tremendous confusion and uncertainty within the regulated community, and in view of the potential financial rewards, almost certainly will spawn additional highly contrived "consumer fraud" suits that further erode the pesticide regulatory scheme. Because the issues raised in the petition are unlikely to be resolved by *Bates v. Dow AgroSciences LLC*, *cert. granted*, 2004 WL 143958 (U.S. June 28, 2004) (No. 03-388), another FIFRA preemption case, the Court should grant review here as well.

I. REVIEW IS NEEDED BECAUSE THE LOWER COURT'S DECISION UNDERMINES THE STRUCTURE AND DISRUPTS THE OPERATION OF THE FEDERAL/STATE PESTICIDE REGULATORY SCHEME

More than thirty years ago, Congress "transformed FIFRA . . . into a comprehensive regulatory statute" governing the registration, labeling, sale, and use of pesticides. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). The Act "establishes 'a coordinated Federal-State administrative system to carry out the new program.' " *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 615 (1991) (quoting H.R. REP. NO. 92-511, at 1 (1971)). Under this federal/state "regulatory partnership" (*ibid.*), the "states have joint control with the federal government in regulating the use of pesticides . . . with the exception of the EPA's exclusive supervision of labeling." *New York State Pesticide Coalition v. Jorling*, 874 F.2d 115, 118 (2d Cir. 1989).

No pesticide may be distributed or sold unless it is registered under FIFRA. 7 U.S.C. § 136a(a). Prior to granting a registration, EPA must determine that a pesticide's labeling complies with the requirements of the Act. *Id.* § 136a(c)(5)(B). To maintain national labeling

uniformity for each FIFRA-registered product, and thereby preserve the integrity, force, and effect of FIFRA's labeling requirements as implemented by EPA, § 136v(b) provides that a "State shall not impose or continue in effect *any requirements for labeling* or packaging *in addition to or different from* those required under [FIFRA]." *Id.* § 136v(b) (emphasis added). Congress intended § 136v(b) "to completely preempt State authority in regard to labeling." H.R. REP. NO. 92-511, at 16 (1971); *see Mortier*, 501 U.S. at 615 (labeling "fall[s] within an area that FIFRA's 'program' pre-empts").

Although § 136v(b) expressly preempts the states from imposing additional or different requirements for labeling, § 136v(a) specifies that the states may "regulate the *sale or use* of any federally registered pesticide," provided that such regulation "does not permit any sale or use prohibited by [FIFRA]." 7 U.S.C. § 136v(a) (emphasis added); *see Mortier*, 501 U.S. at 614 ("§ 136v(a) . . . acts to ensure that the States could continue to regulate use and sales even where, such as with regard to the banning of mislabeled products, a narrow pre-emptive overlap might occur"). Pursuant to this authority, the states have established their own individual state pesticide registration requirements, with which every FIFRA-registered product must comply prior to being sold or used. *See* Tr. 2007:15-24; 2010:6-2011:1; 2068:5-2069:24; 2604:3-9; 2606:22-24; 2612:9-2613:7; 2615:13-2616:11 (testimony of parties' regulatory experts regarding state pesticide registration requirements geared to state and local agricultural and environmental conditions).

Thus, under the federal/state scheme, a product *cannot* be lawfully marketed, advertised, sold, or used for a federally registered use (*i.e.*, crop) in a particular state *unless and until* the state's pesticide regulatory agency, pursuant to the state's own pesticide registration requirements, has

approved the product for that use in that state. In other words, a FIFRA registration *alone* is not a license to sell or use a pesticide product anywhere. *See Mortier,* 501 U.S. at 613-14 ("FIFRA nowhere seeks to establish an affirmative permit scheme for the actual use of pesticides. It certainly does not equate registration and labeling requirements with a general approval to apply pesticides throughout the Nation without regard to regional and local factors like climate, population, geography, and water supply.").

FIFRA's unequivocal prohibition against use of "any registered pesticide in a manner inconsistent with its labeling" (7 U.S.C. § 136j(a)(2)(G)) is another fundamental component of the regulatory scheme. Under this prohibition against misuse of pesticides, applying a product for a use (*i.e.,* to a crop) not included on the labeling is unlawful. Although FIFRA reserves to EPA alone the authority to regulate the content and format of pesticide labeling, Congress, in order to strengthen the federal/state pesticide regulatory partnership, vested *the states* with the "primary enforcement responsibility for pesticide use violations" under FIFRA. *Id.* § 136w-1(a).

The Minnesota Supreme Court's opinion turns this carefully balanced federal/state regulatory scheme on its head. The opinion directly conflicts with § 136v(b) of FIFRA by empowering individual juries to second-guess EPA's labeling regulations (such as the subset labeling regulation) and impose, through the potent method of state law damages awards, their own additional or different requirements for whatever they consider to be proper labeling. Moreover, although FIFRA makes the states responsible for enforcing the Act's critically important prohibition against using a product in a manner inconsistent with its labeling, the lower court's ruling approves the imposition of state law liability for a manufacturer's

facilitating compliance with, and enforcement of, that prohibition.

A. The Opinion Below Imposes State Law Liability for Deceptive Labeling, Even Though *Only EPA* Has Authority To Determine Whether a Product's Labeling Is Deceptive

As the petition explains (Pet. at 8, 11-13), the state supreme court failed to recognize that the trial court's judgment rested on respondents' repeated contentions that petitioner BASF's EPA-approved Poast Plus labeling was deceptive. By affirming that judgment, the decision below squarely conflicts with the federal/state scheme, under which EPA has exclusive authority to determine whether a product's labeling is false or misleading (*i.e.*, deceptive). Nothing in the record suggests that EPA ever made any such determination regarding the EPA-approved labeling at issue in this case.

The Court on previous occasions has acknowledged "FIFRA's historic focus on labeling." *Mortier*, 501 U.S. at 613; *see also Monsanto*, 467 U.S. at 991. This includes the statute's prohibition against labeling which is false or misleading. More specifically, FIFRA makes it unlawful "for any person in any State to distribute or sell to any person . . . any pesticide which is . . . misbranded." 7 U.S.C. § 136j(a)(1)(E); *see generally* 49 Fed. Reg. 37,960 (1984) ("The statutory standard that is the basis for Agency regulation of pesticide labeling is contained in section [136(q)] of FIFRA, which defines a 'misbranded' pesticide and enumerates specific labeling deficiencies that constitute misbranding."). Importantly, "[a] pesticide is misbranded if . . . its labeling . . . is *false or misleading* in any particular." 7 U.S.C. § 136(q)(1)(A) (emphasis added). EPA's registration and labeling regulations hammer this point home: EPA "will approve an application" for registration of

a pesticide product "*only if* . . . [t]he Agency has determined that the product is not misbranded." 40 C.F.R. § 152.112(f) (emphasis added); *see also id.* § 156.10(a)(5) (providing examples of false or misleading label statements or representations); EPA, Label Review Manual (3d. ed.), Ch. 12: Labeling Claims, at Parts II - III (internal guidance to EPA reviewers on false and misleading labeling).

Because § 136v(b) of FIFRA prohibits the states from imposing their own additional or different requirements for labeling, *only EPA*, and not the states, can determine whether a pesticide product's labeling is deceptive. Absent such an EPA determination, a state law claim implying that a pesticide product's EPA-approved labeling is deceptive necessarily imposes a state law requirement for labeling that is "in addition to or different from" EPA's requirements for labeling, and therefore, is expressly preempted. *See Papas v. Upjohn Co.*, 985 F.2d 516, 519 (11th Cir. 1993) (§ 136v(b) expressly preempts plaintiffs' state law claim that a FIFRA-registered pesticide was "misbranded" because "it is for the EPA Administrator, not a jury, to determine whether labelling and packaging information is incomplete or inaccurate, and if so, what label changes, if any, should be made. . . . FIFRA leaves states with no authority to police manufacturers' compliance with the federal procedures"); *see also Bice v. Leslie's Poolmart, Inc.*, 39 F.3d 887, 888 (8th Cir. 1994) ("in the context of FIFRA . . . actual agency approval eliminates any possible claims under state tort law for failure to comply with federal [labeling] requirements") (internal quotation omitted); *MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1025 (5th Cir. 1994) (if plaintiffs "could recover large damage awards because the herbicide was improperly labeled under state law, the undeniable practical effect would be that state law *requires* additional labeling standards not mandated by FIFRA"). "To hold otherwise would be to allow state courts to sit, in effect, as super-EPA review boards that could question the adequacy of the EPA's

determination of whether a pesticide registrant successfully complied with the specific labeling requirements of its own regulations." *Welchert v. American Cyanamid*, 59 F.3d 69, 73 (8th Cir. 1995).

Because the opinion below abrogates EPA's exclusive authority to regulate pesticide labeling, and arrogates that function to individual juries whose vagaries regarding what constitutes proper labeling will destroy the national labeling uniformity that Congress mandated, this case warrants the Court's scrutiny.

B. The Opinion Below Imposes State Law Liability for Utilizing EPA-Authorized Subset Labeling, Which Is An Essential Component of the Federal/State Regulatory Scheme, and a Common and Beneficial Commercial Practice

FIFRA preemption does not depend upon "the guise under which the claim is presented." *Netland v. Hess & Clark, Inc.*, 284 F.3d 895, 900 (8th Cir.), *cert. denied*, 123 S.Ct. 415 (2002); *see also Traube v. Freund*, 775 N.E.2d 212, 217 (Ill. App. 2002) ("FIFRA preemption clearly does not turn upon the name a plaintiff gives to his or her cause of action."). Nevertheless, under the guise of a state law claim for "unconscionable commercial practice," BASF was held liable for marketing a pesticide product (Poast Plus) with *EPA-approved* product labeling that respondents contended was deceptive because, *as allowed by EPA's subset labeling regulation*, it did not include each of the minor crops for which the product was registered under FIFRA. *See* Pet. at 12-13. The state supreme court's opinion affirming that a pesticide manufacturer's use of such EPA-authorized subset labeling represents an unconscionable commercial practice thwarts the objectives of this necessary and widely utilized practice, which is highly beneficial to pesticide users as well as manufacturers.

The subset labeling regulation, 40 C.F.R. § 152.130(b), allows a pesticide manufacturer to distribute a product with labeling that includes less than all of its FIFRA-registered uses:

> A registrant may distribute or sell a product *under labeling bearing any subset* of the approved directions for use, provided that in *limiting the uses listed on the label*, no changes would be necessary in precautionary statements, use classification, or packaging of the product.

Ibid. (emphasis added).[2] In other words, EPA does not require the labeling accompanying a pesticide product to include all of the uses that EPA has approved (*i.e.*, registered) under FIFRA for that product. Instead, the manufacturer may utilize what is commonly known as "subset labeling."

EPA's subset labeling regulation makes it clear that a manufacturer is not required to include on an agricultural pesticide product's labeling, all of the crops encompassed by that product's FIFRA registration. Without subset labeling, the manufacturer would have to include all FIFRA-registered crops, even those for which a state registration has not been sought or obtained. Selling the product with such all-encompassing labeling would violate that state's registration requirements. As a result, the manufacturer could not lawfully sell the product at all within that state, not even for use on the crops which have received the state's approval. Farmers then would be deprived of beneficial crop protection

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[2] Directions for use must include, *inter alia*, "[t]he site(s) of application, as for example the crops . . . to be treated." 40 C.F.R. § 156.10(i)(2)(iii).

products. Alternatively, a manufacturer could seek state registration before a product is fully tested for use on specific crops under the soil, climatic, environmental, and other conditions present in the particular state or region. That, too, would be problematic for both farmers and manufacturers. Therefore, subset labeling is a regulatory necessity. It enables a FIFRA-registered product to be sold for those crops which have received state as well as EPA approval, while avoiding violation of state registration requirements for other crops. Equally important, it affords a manufacturer the opportunity to complete safety testing of the product on such other crops before seeking state registrations.

Furthermore, including all crops covered by a FIFRA registration on a product's labeling can make the directions for use and environmental precautions unnecessarily long and complicated, and thus, difficult for applicators to read, understand, and follow. That in turn can lead to accidental misuse and possible human, crop, or environmental injury. EPA long has recognized that "labeling of greater length, detail and complexity than is desirable from a user point of view" should be avoided. 49 Fed. Reg. at 37,971. For this reason, subset labeling promotes safe and effective use of pesticides.

Subset labeling also is important for commercial reasons. When EPA promulgated the subset labeling regulation in 1988, it formalized a longstanding policy which affords manufacturers flexibility in deciding how to market multi-use (*e.g.*, multi-crop) products. *See* 53 Fed. Reg. 15,952, 15,957 (1988) ("A company having a registered product is permitted (both by current policy and by this final rule) to market the product in a variety of ways."). Thus, a "product may be marketed . . . *bearing different subsets of approved uses* . . . to distinguish primary uses for different regions of the country." *Ibid.* (emphasis added). For

example, utilizing subset labeling, a manufacturer is permitted to sell the same herbicide product in Mississippi labeled only for use on cotton and in Iowa labeled only for use on corn. Along the same lines, subset labeling affords a manufacturer the flexibility to address special regional or local considerations (*e.g.*, soil types, climatic parameters, pest biotypes, and presence of endangered species), for safe and efficacious use of a product on a particular type of crop.

Also, a pesticide product's FIFRA registration may cover both agricultural crop uses and non-agricultural uses (*e.g.*, home, lawn, and garden uses). In such a case, a manufacturer can use subset labeling to distinguish between the agricultural and non-agricultural uses of the same product, which might be packaged (as well as labeled) differently for each category. Without subset labeling, manufacturers would have to try to obtain multiple FIFRA registrations for the same product in order to avoid including agricultural and non-agricultural uses on the same labeling. But "[e]xpanding usage of a single product is often more desirable from a marketing perspective (and usually easier to accomplish) than registering a number of similar products, each with fewer uses." 49 Fed. Reg. at 37,971. Thus, subset labeling conserves EPA's limited resources and provides a way for manufacturers to select from among a product's EPA-approved uses, those that meet the needs of different types of users.

The opinion below severely disrupts the federal/state regulatory scheme by rendering use of subset labeling a perilous practice. Yet, the subset labeling regulation, which specifically authorized BASF to omit minor crop uses from its Poast Plus labeling, necessarily represents EPA's determination that including less than all FIFRA-registered crops on an agricultural pesticide product's labeling does *not* render that labeling deceptive. As a result, any state law claim, such as respondents' claims here, which directly or

indirectly challenge a manufacturer's omission of FIFRA-registered crops from an agricultural pesticide product's labeling, has the inevitable effect of imposing a state requirement for labeling (*i.e.*, a requirement to list all FIFRA-registered crops) which is "in addition to or different from" EPA's labeling requirements, and therefore, is expressly preempted by § 136v(b). For the same reason, state law claims based on advertising or promotional statements which, consistent with a product's EPA-approved subset labeling, do not disclose every FIFRA-registered crop, are expressly preempted. *See generally Kuiper v. American Cyanamid Co.*, 131 F.3d 656, 663 (7th Cir. 1997) ("FIFRA preempts state law claims when the challenged advertising merely reiterates the label.").

Thus, contrary to the opinion below, respondents' claims regarding BASF's decision to refrain from marketing Poast Plus for minor crops are not based on conduct "that went beyond the label" (Pet. App., 20a). Instead, those claims necessarily challenge the subset labeling regulation, and therefore, are squarely within "the reach of federal law" (*id.*) and FIFRA's preemption provision.[3]

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[3] Respondents also contended that the EPA-approved Poast Plus labeling was deceptive because it differed from the labeling of a different, separately registered BASF product, Poast, which contained the same active ingredient, but unlike Poast Plus, contained no special adjuvant and included minor crops on its labeling. *See* Pet. at 4, 13, 16. EPA, however, requires each separately registered product to have its own separately approved labeling. *See* 40 C.F.R. §§ 152.130(a), 156.10(a)(1). Thus, state law claims based on the theory that different products, like Poast and Poast Plus, should be labeled *identically* would impose labeling requirements which are "in addition to or different from"

(Footnote cont'd on next page.)

C. The Opinion Below Imposes State Law Liability for Advocating Compliance With, and Facilitating Enforcement of, FIFRA's Prohibition Against Misuse of Pesticides, Which Is a Fundamental Precept of the Federal/State Regulatory Scheme

Respondents contended at trial that BASF also engaged in "unconscionable" conduct by sponsoring a magazine article reminding readers that off-label use of pesticides (*e.g.*, use of a pesticide product on crops not included on its labeling) is unlawful, and by providing information to state pesticide enforcement officials which led to successful prosecutions of certain pesticide dealers and farmers for off-label use of Poast Plus. *See* Pet. at 2. The opinion below affirms imposition of state law liability based in part on these entirely appropriate and beneficial product stewardship activities.

(Footnote cont'd from previous page.)

those imposed under FIFRA by EPA, and therefore, are preempted by § 136v(b). As to respondents' claim that the name "Poast Plus" was deceptive, that too is preempted for the same reason. Indeed, EPA requires different products to have different names for the very purpose of avoiding confusion, if not deception. *See* EPA Label Review Manual (3d. ed.), Ch. 12: Labeling Claims, at Part IV.C ("The exact same name cannot be used for different products registered by any one registrant. The product name must be sufficiently different to clearly distinguish one product from another."); *see also* 67 Fed. Reg. 14,941 (2002) (announcing the availability of draft EPA guidance on false or misleading pesticide product names).

Off-label use (*i.e.*, misuse) of agricultural pesticide products can cause serious problems such as crop damage, illegal pesticide residues in food crops, pesticide drift or runoff, and hazards to applicators, bystanders, domestic animals, and wildlife. The lower court's ruling, which harshly penalizes BASF for advocating against the off-label use of pesticides in general and Poast Plus in particular, sends shockwaves through the federal/state regulatory structure. If left undisturbed, the opinion below will leave manufacturers with the Hobson's choice of either looking the other way when they suspect that their products are being misused, or incurring the risk of massive state law liability for "unconscionable" conduct by reporting possible misuse. Either way, the impact of the state supreme court's opinion severely undermines FIFRA's prohibition against misuse of pesticides.

> When Congress rewrote the statute in 1972, it
>
> significantly strengthened FIFRA's registration and labeling standards. 7 U.S.C. § 136a. To help make certain that pesticides would be applied in accordance with these standards, the revisions further insured that FIFRA "*regulated the use*, as well as the sale and labeling, of pesticides. . . ."

Mortier, 501 U.S. at 601 (quoting *Ruckelshaus*, 467 U.S. at 991-92) (emphasis added). Prior to 1972, FIFRA contained "no prohibition . . . against the misuse of a registered pesticide." S. REP. NO. 92-838, at 4 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 3996. In order to correct this deficiency, Congress added § 136j(a)(2)(G), which makes it "unlawful for any person . . . to use any registered pesticide in a manner inconsistent with its labeling." 7 U.S.C. § 136j(a)(2)(G). "By prohibiting the misuse of pesticides," Congress intended to "protect the environment and also prevent the growth of commonly recognized practices which

would require the cancellation of registration of a pesticide. . . ." 1972 U.S.C.C.A.N. at 3997-98.

FIFRA's prohibition against using a pesticide in a manner inconsistent with its labeling is commonly known by the maxim "The Label is the Law." During the trial court proceedings below, Dan Barolo, who served as Director of EPA's Office of Pesticide Programs, testified that "[t]he absolute underpinning and foundation of the program is embodied in this particular statement." Tr. 2556. The record of this case reflects that when North Dakota's agriculture commissioner requested EPA to provide an "enforcement waiver" so that farmers could brazenly violate § 136j(a)(2)(G) by applying Poast Plus for crops not listed on its labeling, Dr. Lynn Goldman, EPA's Assistant Administrator for pesticides, responded as follows:

> It is critical for us to keep in mind that, under FIFRA, *the label is the law.* FIFRA § 12(a)(2)(G) [7 U.S.C. § 136j(a)(2)(G)] makes it unlawful to use any pesticide in a manner inconsistent with its labeling. ... *To move away from this basic precept* and inform farmers that it is acceptable to substitute different products with different approved labels has *serious national implications with regard to the health and safety of farmers and workers.* ... One common understanding across the country regarding pesticide applications is that users must follow the label. ... If EPA were to *undermine the basic understanding by farmers that they must follow the labeling on a specific product, we would cause confusion in the regulated community, and, in effect, be encouraging pesticide misuse.*

D. Ex. 636 (emphasis added). By holding a pesticide manufacturer liable for actively discouraging the misuse of agricultural pesticides, the Minnesota Supreme Court's opinion causes the exact type of "serious national

implications" and "confusion in the regulated community" which EPA sought to prevent by refusing an "enforcement waiver" for off-label use of Poast Plus. The lower court's decision may even embolden certain farmers to violate FIFRA (and corresponding state regulatory statutes) by applying pesticide products to crops which are not included on a product's labeling or approved for use by state regulatory agencies.

Congress decided to rely upon the states to enforce FIFRA's prohibition against misuse of pesticides. *See* 7 U.S.C. § 136w-1(a) ("State Primary Enforcement Responsibility"). The lower court's opinion warrants this Court's review because it flouts that important statutory responsibility by condoning imposition of state law liability on a manufacturer for promoting compliance with pesticide labeling and for advocating against misuse.

II. REVIEW IS NEEDED BECAUSE THE LOWER COURT'S DECISION IS HIGHLY DETRIMENTAL TO AGRICULTURE

Respondents took the position that BASF's conduct was "unconscionable" because the company exercised its prerogative to make Poast, but not the lower-priced Poast Plus, available for use on minor crops. Unless reviewed and reversed, the state supreme court's refusal to overturn the jury's astronomical damages award based on respondents' concocted and outlandish consumer fraud theories will deter pesticide manufacturers from developing and marketing pesticides needed by farmers for economical production of minor crops.

As the lower court indicated, " '[m]ajor,' or high acreage crops [wheat; corn; soybeans; cotton] are farmed on millions of acres of land but provide a relatively low financial return per acre." Pet. App., 2a. In contrast, " '[m]inor,' or high value crops [all fruits and vegetables, and dozens of other types of non-major crops] are farmed on

fewer acres, but yield a much greater profit per acre." *Ibid.* Although "minor" crops are grown on less acreage than major crops, their production is a cornerstone of American agriculture, and their abundant availability is taken for granted by the consuming public. Nevertheless, the costs of generating crop residue and other data required for FIFRA registration of a pesticide product on a low-acreage minor crop are the same as for a high-acreage major crop. For this reason, it is much more difficult for a manufacturer to recoup data development and other registration costs for minor crops. Indeed, for some minor crops the costs of registration data development *exceed* the manufacturer's market potential for that crop.

Thus, as the lower court acknowledged, pesticide manufacturers' economic incentives for entering minor crop markets are precarious:

> According to research funded by the United States Department of Agriculture, the herbicide market for minor crops has little competition because the market potential for a pest control product on specific crops is low, *giving agricultural companies little incentive to absorb the cost of developing the data necessary for registration of a herbicide on individual crops, particularly minor crops.*

Ibid. (emphasis added). Because of the long-standing need to maintain and bolster pesticide manufacturers' incentives to develop products suitable for use on minor crops, Interregional Research Project No. 4 ("IR-4") was established in 1963 as a cooperative effort between USDA and state agricultural research centers. *See* Tr. 3245. IR-4 Executive Director Robert Holm testified at the trial below that the program's "sole purpose is to provide crop-protection solutions for minor crop growers, the rationale being that . . . crop-protection companies *lacked the economic incentive* to

develop their chemicals on minor crops." *Id.* 3246 (emphasis added).

The lower court's decision shatters whatever fragile incentives manufacturers like BASF may have for diverting limited R&D resources to development of test data needed to register new or existing pesticides for use on minor crops. Indeed, the ruling foists massive financial liability upon BASF *for the very reason* that it made such an investment by registering its thoroughly tested, cost-effective, Poast herbicide, on both a federal and state level, for use on dozens of minor crops (*see* Pet. at 4), but refrained from doing the same for the newer Poast Plus, which had not been adequately tested for phytotoxicity (*i.e.*, potential injury) to minor crops (*id.* at 5).

Responsible product stewards like BASF exhaustively test their products for phytotoxicity on a crop-by-crop basis before making them available to farmers. Moreover, testing typically has to be conducted on a regional or local basis, in order to take into account differing soil, terrain, climatic, environmental, and other conditions. In addition, because farmers commonly "tank mix" different pesticide products prior to application, testing on various combinations of products often has to be conducted to ascertain whether a tank mixture will be phytotoxic when applied to crops grown in a particular state or region. The results of these and other types of phytotoxicity testing very well may determine the particular states in which a product will be sold, and thus, registered.

The lower court's ruling, however, penalizes BASF's forbearance from rushing to farmers a product which had not been fully tested for phytotoxicity on minor crops. Growers can hardly afford to destroy or damage their low-acreage minor crops with an inadequately tested product or tank mixture. Nor can pesticide manufacturers bear that risk. As a result, the decision below virtually demolishes already

scant incentives for manufacturers to develop or expand products for use on minor crops. If the ruling is allowed to stand, the inevitable consequence will be that many minor crop growers throughout the nation will be deprived of the pesticide products that they need because a small group of growers filed this suit to retroactively increase their profits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:
DOUGLAS T. NELSON
SEEMA MAHINI
CropLife America
1156 15th Street, NW
Washington, DC 2000
(202) 296-1585

LAWRENCE S. EBNER
Counsel of Record
McKenna Long &
Aldridge LLP
1900 K Street, NW
Washington, DC 20006
(202) 496-7500

Attorneys for *Amicus Curiae*

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